

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



February 7, 2002

**Alternate order to CA-3  
from 2/7/02 Agenda**

TO: PARTIES OF RECORD IN A.01-05-012

Enclosed is the alternate to Item CA-3. This is the Alternate Draft Decision of Commissioner Wood to the Proposed Decision of Administrative Law Judge (ALJ) Ryerson previously mailed to you.

When the Commission acts on this agenda item, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

As set forth in Rule 77.6, parties to the proceeding may file comments on the enclosed alternate at least seven days before the Commission meeting or no later than February 14, 2002. Reply comments should be served by February 19, 2002. An original and four copies of the comments and reply comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by overnight service.

/s/ LYNN T. CAREW  
Lynn T. Carew, Chief  
Administrative Law Judge

LTC: mnt

Enclosure

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER WOOD**

(Mailed 2/7/02)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of SCX, Inc., a California Corporation, for a Certificate of Public Convenience and Necessity to Operate as a vessel Common Carrier in Scheduled and Nonscheduled Service Between San Diego, Oceanside and Marina Del Rey; Request for Interim Authority to Commence a Demonstration Service Between San Diego and Oceanside.

Application 01-05-012  
(Filed May 4, 2001)

**OPINION GRANTING APPLICATION FOR CERTIFICATE OF CONVENIENCE  
AND NECESSITY TO OPERATE AS A VESSEL COMMON CARRIER IN  
SCHEDULED AND NONSCHEDULED SERVICE****Summary**

The application of SCX, Inc. (SCX) to operate scheduled vessel common carrier service between San Diego and Oceanside, and unscheduled vessel common carrier service between San Diego, Oceanside, and Marina Del Rey, is approved, subject to the condition that SCX or protestant Sea Planes, Inc. (Sea Planes) may file a petition to modify our order within six months of commencement of the service.

**Background and Procedural History**

SCX is a startup corporation organized for the purpose of engaging in the vessel common carrier services at issue here. Specifically, SCX requests authority to commence the operation of a scheduled vessel service between San Diego and

Oceanside for commuters under a state-sponsored Traffic Congestion Relief Program, and to add nonscheduled service to Oceanside and Marina Del Rey as soon as possible after commuter service begins. SCX's plans are predicated upon receipt of a \$5 million State of California Traffic Congestion Relief Program grant to operate the commuter service for the first year. Funds for that program are administered by the San Diego Unified Port District (Port). At the time it filed the application, SCX was a finalist in the Port's selection of an operator for this service.

A timely protest was filed by Sea Planes, the other finalist in the selection process.<sup>1</sup> Sea Planes is a vessel common carrier authorized to operate other scheduled services along the Southern California coast that are not yet operating. Its protest poses questions about the certainty of SCX's funding, the availability of its vessel, and its ability to operate service to Marina Del Rey on as fast a schedule as projected in the application. The ALJ held a telephonic prehearing conference (PHC) on July 25 and ascertained that the Port had not yet decided which party would receive the grant and operate the service. Consequently, with the parties' concurrence, the ALJ continued the PHC until after the Port made its selection.

By letter dated August 23, SCX advised the ALJ that the Port had adopted a resolution authorizing its staff to enter into contract negotiations with SCX for operation of the demonstration commuter service, and to submit the necessary application to the California Transportation Commission. The resolution also authorizes its staff to substitute Sea Planes as the operator if SCX does not

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<sup>1</sup> The proceeding was reassigned from a staff examiner to Administrative Law Judge (ALJ) Ryerson on July 3, 2001, upon filing of Sea Planes' protest.

possess a suitable vessel within six months. Another resolution authorizes the Port's staff to enter into a master agreement with CalTrans to accept ferry grant funding.

These actions by the Port obviate the concerns raised by Sea Planes about the availability of funds or the suitability of a vessel for SCX's proposed operation. Moreover, as the Port's choice to be the contingent operator, Sea Planes will step into SCX's shoes if SCX fails to obtain a suitable boat, and the funding will roll over to Sea Planes in that event. A letter from Sea Planes dated August 28 confirmed SCX's selection as operator, with the result that there is no significant material opposition to the application.

The ALJ reconvened the PHC on September 7.<sup>2</sup> The parties agreed that the application may be decided ex parte if our order grants the parties leave to file a petition for modification for a period of six months after the service begins.

### **Discussion**

According to SCX's application, CalTrans estimates that 14,000 to 16,000 vehicles daily use Interstate Highway 5 between Oceanside and San Diego during rush hours. SCX hopes to divert at least 5 per cent of these commuters to its demonstration vessel service. The fact that the Port has determined it will sponsor and administer the proposed vessel service under the California Traffic Congestion Relief Program is strong evidence of public need for that service, or at least to test, at public expense, whether the need exists.

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<sup>2</sup> No reporter was present at this PHC, and consequently there is no transcript of the proceedings. The matters related here constitute the official record of this PHC.

SCX's preliminary pro forma expense figures project that the first-year cost of operating the commuter service will be \$4.9 million. Its first-year funding for this service will be \$5 million, and that funding is assured because it has been approved by the Port and is being obtained from CalTrans under the State's subsidy program. This funding exceeds the projected cost of operation by \$100,000. Any additional cost of operating SCX's contemplated nonscheduled service essentially must be recovered from the revenues from that service. SCX has the financial ability to operate the service as a result of this subsidy arrangement and the ability to add nonscheduled service at its discretion.

In support of this application, the Applicant submitted a copy of the Final Mitigated Negative Declaration for the "Oceanside - San Diego High-Speed, Low-Emission Ferry Demonstration Project", prepared by the San Diego Unified Port District as lead agency for the project for purposes of the California Environmental Quality Act (Public Resources Code Section 21000 et seq., hereinafter "CEQA"). In addition, a Notice of Determination was filed with the State Clearinghouse on January 15, 2002.

The project, funded under the "Traffic and Congestion Relief Act of 2000" is intended to test whether such ferry service could attract commuters and relieve congested weekday traffic on I-5.

The environmental review evaluated potential impacts in 15 issue areas, including land use & planning, population & housing, transportation & circulation, noise, air quality, water, hazards, biological resources, cultural resources, and recreation. The review identified no potentially significant or significant impacts in any issue area, and found that the project will have no significant impact on the environment. Nevertheless, in approving the project, the lead agency adopted a Mitigation, Monitoring and Reporting Program

requiring 3 mitigations related to air quality and 4 related to marine biological resources.

The mitigations related to air quality involve retrofitting the diesel engine with a water injection system to reduce NOx emissions, publishing a Request for Proposals to seek a supplier of alternative fuels, and demonstration of the use of an alternative fuel and particulate trap for at least 3 months along with the measuring of emissions levels.

The mitigations related to marine biological impacts involve keeping a daily log of marine mammal and seabird sightings, etc, to establish daily patterns, the provision of night vision binoculars to crew standing watch, and specific requirements in the Procedures and Operations Manual for maintaining required distances from sea lions, harbor seals dolphins, and whales, as well as procedures to avoid marine mammals and seabirds plus procedures to follow in the event of collision with marine mammals or seabirds.

We find that the lead agency conducted an adequate environmental review and adopted reasonable mitigation measures to ensure the project will not result in significant environmental impacts. Accordingly, we adopt the lead agency's findings and mitigation requirements for purposes of our approval.

Although SCX had neither a vessel nor employees to operate the service when it filed its application, these matters clearly are addressed by the Port through its selection and contracting process. Adequate incentives and assurances that the operator will be operationally qualified are guaranteed not only by this process, but also by the Port's right to substitute Sea Planes (a certificated operator) for SCX in the event that SCX is unable to satisfy this commitment. The parties' request to include a condition allowing modification of the order is consistent with this procedure.

This is now an uncontested matter in which the decision grants the relief requested. We will approve the application ex parte.

**Findings of Fact**

1. There is a public need for a common carrier vessel service to be operated between Oceanside and San Diego on a demonstration basis under the State of California's Traffic Congestion Relief Program.
2. No nonscheduled common carrier vessel service is now operated between San Diego, Oceanside, and Marina Del Rey.
3. SCX is financially fit to operate the services proposed in the application.
4. The San Diego Unified Port District prepared a final mitigated negative declaration for the project as lead agency for purposes of CEQA, and filed a Notice of Determination approving the project on January 15, 2002.
5. San Diego Unified Port District determined the project would have no significant impact on the environment, however, adopted specific air quality and marine biological mitigation measures as part of the project approval.
6. Adequate assurances exist through the Port's process for selecting and funding the operator of the demonstration project that SCX will be operationally qualified to operate the service when it commences. Including a provision in the Port's resolution and in the resulting operating contract allowing substitution of Sea Planes for SCX as operator of the service if SCX is unable to furnish a satisfactory vessel, and including provision in our order allowing the parties to file a petition to modify the order within a six-month period after service commences, are consistent with and necessary to making this finding.
7. It can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

**Conclusion of Law**

SCX's application should be granted, subject to the terms and conditions of the order.

**O R D E R**

**IT IS ORDERED** that:

1. We find San Diego Unified Port District's environmental review and adopted mitigation measures are reasonable to ensure the project will not result in significant environmental impacts, and we adopt the findings and mitigation measures for purposes of our approval.

2. Applicant SCX, Inc. (SCX) is granted a Certificate of Public Convenience and Necessity authorizing it to operate as a vessel common carrier as defined in Pub. Util. Code §§ 211 and 238 to transport persons and their baggage between the points set forth in the Appendix VCC-87 hereto, subject to the conditions contained in the following paragraphs.

3. Applicant shall:

- a. File a written acceptance of this certificate within 30 days after this order is effective.
- b. Establish the authorized service and file tariffs and timetables within 120 days after this order is effective.
- c. State in the tariffs and timetables when service will start; allow at least 10 days' notice to the Commission; and make timetables and tariffs effective 10 or more days after this order is effective.
- d. Comply with General Orders Series 87, 111, and 117.
- e. Remit to the Commission the Transportation Reimbursement Fee required by Pub. Util. Code § 403 when notified by mail to do so.



4. Applicant is authorized to begin operations on the date that the Rail Safety and Carriers Division mails a notice to the applicant that its evidence of insurance and other documents required by Ordering Paragraph 2 have been filed with the Commission, and that the U.S. Coast Guard has approved the use of the applicant's vessel for service.

5. The authority to operate as a vessel common carrier as granted herein shall expire unless exercised within 180 days after the effective date of this order.

6. A petition to modify this order may be filed by either party within six months after the date that service actually commences, notwithstanding any provision in our Rules of Practice and Procedure relating to the filing of such petition.

7. Application 01-05-012 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

Appendix VCC-87

SCX, Inc.  
(a corporation)

Original Title Page

CERTIFICATE  
OF  
PUBLIC CONVENIENCE AND NECESSITY  
AS A VESSEL COMMON CARRIER  
VCC-87

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Showing vessel common carrier operative rights, restrictions,  
limitations, exceptions, and privileges

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All changes and amendments as authorized by  
the Public Utilities Commission of the State of California  
will be made as revised pages or added original pages.

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Issued under authority of Decision \_\_\_\_\_,  
dated \_\_\_\_\_, of the Public Utilities Commission  
of the State of California in Application 01-05-012.

Appendix VCC-87

SCX, Inc.  
(a corporation)

Original Page 1

**I N D E X**

	<b>Page</b>
SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS, LIMITATIONS, AND SPECIFICATIONS.....	2
SECTION II. ROUTE DESCRIPTION .....	3

Appendix VCC-87

SCX, Inc.  
(a corporation)

Original Page 2

**SECTION I. GENERAL AUTHORIZATIONS, RESTRICTIONS,  
LIMITATIONS, AND SPECIFICATIONS.**

SCX, Inc., a corporation, by the certificate of public convenience and necessity granted by the decision noted in the foot of the margin, is authorized to conduct scheduled and nonscheduled vessel common carrier services, for the transportation of passengers and their baggage, between the points described in Section II, subject however, to the authority of this Commission to change or modify this authority at any time and subject to the following provisions:

- A. No vessel shall be operated unless it has met all applicable safety requirements, including those of the United States Coast Guard.
- B. The term "on-call" service shall be performed at hourly or per diem rates that include the services of vessel and crew, regardless of the number of passengers transported. Transportation shall not be performed on an individual fare basis.
- C. The term "charter" service, as used herein refers to service in which the vessel is engaged, for a specified charge, by a person or group of persons for the exclusive use of said person or group of persons. The tariffs shall show the conditions under which each "charter" service will be rendered. Transportation shall not be performed on an individual fare basis.

Appendix VCC-87

SCX, Inc.  
(a corporation)

Original Page 3

SECTION II. ROUTE DESCRIPTION.

A. **SCHEDULED SERVICE**

San Diego-Oceanside

Between San Diego and Oceanside.

B. **NON-SCHEDULED SERVICE**

On-Call and Charter Service

Between San Diego, Oceanside, and Marina Del Rey.